# MALAYSIAN REPORTS

## AHMAD BIN SAPALU v. JENEDIAH BINTI ASMAUL

**[A.C.J. (Seah J. (President), Datuk Haji Abdul Wahid Wee, Resident and O.K.K. Tuan Haji Taib bin Menggah)**
**October 28, 1974]**
**[Kota Kinabalu — Native Court of Appeal No. 12 of 1974]**

*Native Customary Law — Marriage — Consent of adult — Native Court ordering a man to marry against his will — Muslim law — Native custom — Contrary to public policy.*

*Muslim Law — Marriage — Consent of adult — Order of native court compelling man to marry against his wishes.*

In this case the Native Court at Paper acting on a complaint of illegal sexual intercourse had ordered the appellant to pay a fine of $150 and to marry the girl, Jenediah, and pay a dowry according to custom. It was also ordered that if he failed to marry the girl he will be imprisoned. The District Officer confirmed the order and the appellant appealed.

**Held:** the Native Court was wrong in making an order compelling the appellant to marry the respondent against his wishes and that part of the order of the Native Court must be set aside.

*Case referred to:-*

(1) *Asang bin Lintuhun* v. *Yatun bin Datu Bidin,* Lee Hun Hoe's Cases on Native Customary Law in Sabah (1953-1972), p. 76.

NATIVE COURT OF APPEAL.

**Seah J., President** (delivering the judgment of the Court): At the conclusion of the hearing on January 9, 1974 the Native Court at Papar purported to make the following order, namely:

"Ahmad is ordered to pay a fine of $150 and he is further ordered that he is to marry Jenediah and pay a dowry according to custom. Failure to pay the fine he is to be sent to prison for 3 months and failure to marry the girl he will be imprisoned.

The girl is ordered to pay a fine of $150 default one month's jail".

This purported order of the Papar Native Court was confirmed by the District Officer at Papar on January 22, 1974.

The appellant is dissatisfied with the decision and has now appealed to us.

When the appeal came before us on September 26, 1974 and after reading the record of proceedings, we made the undermentioned order, namely:

"The court is of the view that the Native Court at Papar should be directed to furnish a report in writing explaining whether the decision to order the appellant, Ahmad bin Sapalu to marry the respondent, Jenediah binti Asmaul was based on native law and custom or Muslim law or Islamic law."

We have now received a reply to the effect that the purported order directing the appellant to marry the respondent was based on Muslim law.

In the Native Court of Appeal's case of *Asang bin Lintuhun* v. *Yatun bin Datu Bidin*(1) it was decided that:

(i) according to Muslim law the consent of an adult was necessary to the validity of a marriage;

(ii) that regardless of the question of public policy it was contrary to native custom and Muslim law to force a man to marry against his will. —

This judgment was given on March 31, 1967.

Following this decision it is plain that the Papar Native Court was wrong to make an order compelling the appellant to marry the respondent against his wishes. The Native Court can only suggest that the appellant marries the respondent. This of course, has no legal effect if the appellant disregards the suggestion. Since the appellant has made it clear in no uncertain terms that he does not wish to marry the respondent, this court has no alternative but to set aside that part of the order of the Papar Native Court purporting to order the appellant to marry the respondent and to pay the customary dowry, or to go to prison if the appellant refuses to marry the respondent.

This court affirms the order of the Papar Native Court ordering both the appellant and the respondent to pay a fine of $150 each. It is hereby ordered that in default of payment of this fine within thirty days from date hereof, the party shall be committed to the civil prison for a period of two months. According to native custom the appellant is further ordered to pay to the respondent berian of $100 within thirty days from date hereof. And in default the appellant shall be imprisoned for a period of thirty days. Both sentences to run concurrently.

To that extent the appeal is allowed.

*Order accordingly.*

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## WONG TIN VUI v. PATRICK MIDOK & ANOR.

**[O.C.J. (Yusoff J.) October 31, 1974]**
**[Kota Kinabalu — Civil Suit No. 42 of 1972]**

*Tort — Negligence — Loss of vision in right eye — Damages.*

*Damages — Loss of vision in right eye — Fall in value of money.*

The plaintiff was involved in a collision between a motor car driven by the second defendant and a bicycle ridden by himself. He sustained various personal injuries resulting in the loss of vision in his right eye. Interlocutory judgment was given against the defendants and the only question to be decided was that of damages.

**Held,** in the circumstances of this case, the court would award $20,000 for the loss of vision in the right eye and scars on his face, $3,000 for pain and suffering and $5,000 for loss of amenities and other disadvantages.

*Cases referred to:-*

(1) *Mohamed Ikhawan* v. *Johar & Anor.* [1966] 1 M.L.J. 179.

(2) *Peck Hock Ser* v. *The Green Bus Co. Ltd.* [1964] M.L.J. lxxiii.

(3) *Drenan* v. *Greer* [1957] M.L.J. 77.

(4) *Low Ah Tow* v. *Yusof bin Kayab* [1954] M.L.J. 112.

(5) *Pahang Lin Siong Motor Co. Ltd. & Anor.* v. *Cheong Swee Khai & Anor.* [1962] M.L.J. 29.

(6) *Phuah Jee Suan* v. *Nila Vasu Pillai* [1973] 1 M.L.J. 186.

CIVIL SUIT.

*Clement Skinner* for the plaintiff.

Defendants in person.

**Yusoff J.:** On the 17th of August, 1970 at about 8.00 a.m., the plaintiff, a 14 years old boy was riding his bicycle along Mile 7th Tuaran Road towards the direction of Tuaran District whilst the second defendant who was driving a motor-car belonging to the first defendant along the same road came into collision with the bicycle ridden by the plaintiff. Following the accident, plaintiff sustained various personal injuries resulting in the loss of vision in his right eye. He was admitted to hospital on the same day and was discharged three days later on August 20, 1970.

The plaintiff suing through his father, Wong Nyen Shin, as next friend, issued a writ on February 5, 1972 against both the first and the second defendants. Plaintiff having obtained interlocutory judgment against both the defendants on April 10, 1972 now applies to have the damages assessed.

The medical report at Exhibit P3 shows that the plaintiff had eight separate wounds five of which were confined to the head and right side of his face. He was unconscious when admitted to hospital. There was no operation necessary. But on later examinations by the State Ophthamologist (PW1) it was found that the plaintiff has lost his right eye permanently. It was also found that the plaintiff had multiple facial scars resulting from injuries received during the accident — Exhibit P2 and 3.

There are three items included in the claim for special damages; cost of the bicycle, transport charges for his parents for three days to see the plaintiff at the hospital and extra nourishing food, all totalling to $520. These claims are reasonable and I allow them.

On general damages the claim is made under the following heads:

(a) pain and suffering;
(b) loss of future earning;
(c) disadvantages arising from disabled condition;
(d) loss of amenities and
(e) loss of value of money.

To assess proper damages it is imperative to have some guidance from past cases, to see whether those cases bear a measure of similarity which would be helpful in assessing the damages.

In *Mohamed Ikhawan* v. *Johar & Anor.*[1] a boy, aged 14 years sustained severe personal injuries when he was knocked down by a lorry driven by the first defendant while he was riding his bicycle. The boy sustained fractures of his left cheek bone and left humerus and was blinded in the left eye. The trial judge awarded him $12,500 general damages. The Federal Court held that it would not have been justified in interfering with the award but in view of the fact that the plaintiff would continue suffering from watering of the eye and from his facial disfigurement and that he had an arm disablement for some two years, the award was increased to $15,550. It was also held that the damages awarded by the trial judge were too low and he had in particular overlooked the consideration of the increased vulnerability of a one-eyed man.

In *Peck Hock Ser* v. *The Green Bus Co. Ltd.*[2] a taxi driver aged 28 years suffered multiple lacerations of both sides of the face involving both eye lids. The right tibia region of the leg was fractured. Left eye was damaged and limited to counting fingers at one metre only. Loss of vision was 90%. Ambrose J awarded general damages of $12,000 for the eye, $3,000 for leg injury and $6,000 for loss of future earning.

As regards pain and suffering Thomson C.J. (as he then was) said in *Drenan* v. *Greer*[3]:

"so far as concerns such questions as pain and suffering and what the learned judge in this case called loss of amenities, any assessment of damages must contain a very large subjective element. A very large part in the assessment must be played by the personal opinion of the trial judge."

In *Low Ah Tow* v. *Yusof bin Kayab*[4] the injuries received by the plaintiff were serious and permanent. The plaintiff had to remain in hospital for three months and continued to go there twice a week for about six months; the Court of Appeal held that an award of $5,000 was not excessive for pain and suffering.

In *Pahang Lin Siong Motor Co. Ltd. & Anor.* v. *Cheong Swee Khai & Anor.*[5] the plaintiff involved in a collision with a lorry sustained serious injury to his right arm which had to be amputated. He was awarded $25,000 as general damages. This amount was made up of $3,000 for pain and suffering; $13,000 for possible loss of future earning; and $8,500 for disadvantages other than loss of earning capacity likely to arise in the future as a result of his disablement. On appeal it was held that whether or not the award made by the trial judge was satisfactory, in all the circumstances of the case, it was not a wholly erroneous estimate of the damage suffered.

There is no similarity of facts and circumstances in those decided cases with the present claim. But it is noticeable that in those years the award for total or partial loss of one eye was not less than $12,000 and awards on other items depended on the facts peculiar to each case.

It is urged by the plaintiff's counsel that any award made by the court must take into account of the loss of value of money resulting from the present trend of inflation. In this regard PW4 who is the Government's Statistician shows by his department's indices (Exhibit P4) that the cost of living in Sabah has increased by 17% since 1967. I agree that most of the cases dealing with similar injuries sustained were decided some years ago. Some allowance has to be made for the diminishing value of money since those cases were decided. With respect, I approvingly quote Choor Singh J. who said in *Phuah Jee Suan* v. *Nila Vasu Pillai*[6]:

"It is imperative that where an old comparable case is considered, there should be an adjustment for the change in the value of money which should be reflected in the award."

In these circumstances, in awarding general damages, I would take into consideration his vulnerability as a one-eyed man, the scars on his face, pain and suffering. I would also consider his loss of amenities and the disadvantages arising from his disabled condition, and the change in value of money resulting from the existing inflation should not be overlooked.

For loss of vision in the right eye and scars on his face, I assess a sum of $20,000. For pain and suffering $3,000 and for loss of amenities and disadvantages other than loss of earning capacity a sum of $5,000. There is no award for future earning. There is no evidence adduced in this regard.

In the result the award for special damages would be $520; general damages would be $28,000. There will therefore judgment for $28,520 with costs to be taxed and interest at 6% per annum from date of judgment.

*Order accordingly.*

Solicitors: *Shelley Yap.*